BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA CUNNINGHAM Claimant	)	
VS.	)	
FARMERS COOP ASSOCIATION Respondent	)	Docket No. 265,645
AND	)	
NATIONWIDE AGRIBUSINESS INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order dated October 2, 2001, entered by Administrative Law Judge Brad E. Avery.

ISSUES

Judge Avery ordered respondent and its insurance carrier to provide claimant with medical treatment with Dr. Bailey. Respondent and its insurance carrier contend they are not liable for additional medical treatment because claimant suffered an intervening accident and injury with her subsequent employer. The issue for Appeals Board review is whether claimant's present need for medical treatment is the result of an accidental injury or injuries that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds the Administrative Law Judge's preliminary hearing Order should be affirmed.

Findings of Fact

1. Claimant was employed by respondent at its Ampride service station in Lawrence, Kansas. She worked for respondent almost two years until October 25, 2000, when she was laid off after respondent filed for bankruptcy.

2. Claimant's job duties for respondent included preparing and serving food and other various delicatessen related tasks. She suffered a repetitive use injury to her right upper extremity and was sent by respondent to an orthopedic surgeon, David M. Beard, M.D., for treatment.

3. Dr. Beard's treatment of the claimant, including injecting the right lateral epicondyle with cortisone, helped relieve her symptoms. She was released to return to work without restrictions on June 9, 2000.

4. On August 16, 2000, claimant was evaluated by orthopedic surgeon, Phillip L. Baker, M.D., for purposes of establishing an impairment rating. Dr. Baker's report dated August 22, 2000, to the insurance adjuster states claimant was not experiencing any pain or discomfort in her right elbow at that time. The physical examination was normal except for slight tenderness over the lateral epicondylar area at both elbows. Dr. Baker found claimant to have no permanent impairment of function under the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

5. Thereafter, claimant continued performing her regular job duties at the Ampride service station. According to claimant, her right elbow problems returned. Claimant stated that she told the store manager, Mr. Gary Rhodd, that she was hurting but she was not provided any additional treatment. Mr. Rhodd did not testify.

6. Eventually, claimant went on her own to her personal physician, Dr. William A. Bailey, on July 3, 2001. Dr. Bailey found significant tenderness in the lateral epicondylar area and recommended physical therapy treatment for her lateral epicondylitis.

7. After claimant was laid off by respondent on or about October 25, 2000, she was unemployed for awhile before finding work as a hairdresser. Respondent contends it was this employment that caused her pain to reoccur and worsen. Respondent argues that this subsequent work activity constitutes a new injury or aggravation of her preexisting condition which relieves respondent and its insurance carrier from any responsibility for claimant's additional medical treatment.

Conclusions of Law

1. An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[1] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[2] An injury is not compensable, however, where the worsening

[1] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

[2] Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[3]

2. Claimant testified her symptoms returned after she was treated and released by Drs. Beard and Baker. Furthermore, she testified she informed respondent of this worsening, but was denied additional medical treatment. Claimant's testimony is uncontradicted. Respondent presented no witness testimony to refute these allegations. After observing claimant testify, Judge Avery apparently found her testimony credible and ordered respondent and its insurance carrier to provide additional medical treatment. Considering claimant's testimony at preliminary hearing and the medical records in evidence, the Appeals Board agrees with the conclusion by the Administrative Law Judge. Therefore, the Appeals Board affirms the finding that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent each and every working day through October 25, 2000, and her present need for medical treatment is a direct result of that employment.[4]

3. Based on the record presented to date, the Appeals Board further finds claimant did not sustain an intervening accident or injury. Claimant's hairdresser job was temporary. At the time of her preliminary hearing testimony, claimant was no longer working as a hairdresser. Although claimant's symptoms worsened while she was working at Snip & Clip, there is no evidence her symptoms worsened beyond what she had experienced at Ampride. Furthermore, there is no evidence that her work activities at Snip & Clip permanently worsened her condition.

4. As provided by the Act, preliminary hearings are not binding but subject to modification upon a full hearing on the claim.[5]

AWARD

WHEREFORE, the Appeals Board affirms the Order dated October 2, 2001, entered by Administrative Law Judge Brad E. Avery.

IT IS SO ORDERED.

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[3]Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

[4]At the September 28,2001, preliminary hearing, counsel stipulated that claimant's "prior date of accident" was listed as 12-22-99. Although the Administrative Law Judge's notes reflect a pretrial stipulation was made to a December 22, 1999, accident, it is not clear whether the parties were stipulating that this was the date of accident for the series of accidents alleged in this docketed claim. The Board notes that the date of accident on claimant's form K-WC E-1, Application for Hearing, is October 25, 2000.

[5]K.S.A. 44-534a(a)(2).

Dated this _____ day of December 2001.

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BOARD MEMBER

c: Timothy J. Pringle, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director